Neither could the Government join in one and the same count of an indictment the false representations of citizenship separately made to Siu and Hopkins. It would be an improper joinder.

Kotteakos v. U. S., 328 U. S. 748, 774.

The Government cites three cases as supporting their contention that proof that the false representation was made to Hopkins was a harmless variance. These cases are wholly inapplicable and deal with entirely different situations:

The case of *Bennett v. United States*, 227 U. S. 333, 338, reviewed a conviction for violation of the White Slave Act. The defendant was charged in one count of the indictment in the United States District Court of Ohio for having caused the transportation of one Opal Clark. The testimony disclosed that the woman transported had gone by the names of Opal and Nellie and that her true name was Jeanette LaPlante. This Court held that the variance was not fatal inasmuch as the record shows that the defendant was informed of the charge against her and the record is in such shape as to protect her against another prosecution for the same offense. A further point of variance was urged as to the second count on the ground that it alleged that the tickets were procured at Chicago, Illinois, whereas the testimony showed that they were purchased in Cincinnati. The testimony disclosed that the tickets were purchased in Cincinnati and then sent to Chicago where the women transported got them and used them for the transportation from there. This Court said, "It is not possible to imagine that the variance caused any prejudice. . . ." A third variance was asserted in that the indictment charged that the transportation of two women

and the proof was of the transportation of one. This Court said, "How what the defendant did not do can be considered material description of what she did do is not easy to imagine."

The case of *United States v. Sprinkle,* 57 F. 2d 968, 969 (C. A. 2) was a mail fraud case. There were two claims of variance; the first that testimony of false representations other than those charged in the indictment was received. The Court of Appeals held that:

> "False statements outside scheme charged are competent to show the defendant's fraudulent intent. If such false statements were part of the fraudulent scheme charged they should have been alleged as such in the indictment and proof of them without such allegations constitute a variance . . . this is clearly not such a case."

The second claim of variance was directed at the proof of mailing of the indictment letters; of this claim, the Court said:

> "It would suffice to say that proof of count six is sufficient to sustain the conviction without regard to questions of variance as to the other counts."

In the case of *Ferrari v. United States,* 169 F. 2d 353 (C. A. 9), the defendant was convicted of fraudulently concealing and facilitating the concealing of heroin, which defendant knew had been imported into the United States contrary to law. The Court held that although the indictment charged the defendant with receiving the heroin from one person and proof established another

person to be the one associated with him in concealment of the drug, variance was not fatal. The man named in the indictment as being present with appellant at the time the offense was alleged to have been committed and the other man that the evidence disclosed was there with appellant, were both present at the trial and each testified on appellant's behalf. The substantive offense in this case was not with whom he dealt but the illegal use and concealment of the drug at a specific time and place. Obviously, in the absence of surprise, the defendant could not have been effected by the variance.

In the instant case we have the precise situation of one convicted on a charge not made. The cases set forth at page 13 of our Petition and Brief, hold that a conviction upon a charge not made is sheer denial of due process.

The Government has failed to make any answer to our further position that the trial of a defendant on a charge different from that found by grand jury is violative of the Fifth Amendment to the Constitution, and that a conviction "on charge other than as made by grand jury presentment is jurisdictional and therefore void." (See cases cited our Petition and Brief, p. 14.)

We add that proof of a distinct and separate false representation of citizenship from the one charged, as here, does violence to the Sixth Amendment requirement that "in all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

II.

The Decision of the Court of Appeals Is in Direct Conflict With the Decisions of Other Courts of Appeal Upon the Same Questions: Also, the Court of Appeals Has Decided Questions of Substance Relating to the Construction of a Statute of the United States, Which Has Not Been, but Should Be Settled by This Court.

This point is discussed at pages 7-13 of the Government's Brief in Opposition; it is discussed in our Petition and Brief at pages 14-28.

The Government, at page 13 of its Brief in Opposition, states that we argue that the false representation was not pertinent to the matter of his arrest on a gambling charge. Our position is far from being so limited. Of course, the false representation was not pertinent to the matter of his arrest on a gambling charge. Neither was it material to his booking. There is no testimony that Exhibit 5 was used by the Sheriff for any purpose whatsoever. There is only testimony covering the use and purpose of Exhibit 4, but this arrest slip did not contain the citizenship question; and as to this Exhibit the testimony was that it was used by the sheriff's office itself "for identification and the charge that they are booked on." We reiterate that U. S. citizenship has no relevancy or materiality as to any matter under consideration. Arrest of Petitioner for suspicion of bookmaking, and at most, his identity was the pertinent subject matter. Identity, of course, was fully established by age, address, color of hair and eyes, complexion, physical characteristics and fingerprints.

Counsel is entirely in error when he says that none of the appellate decisions construing the statute supports the

contention that claims of United States citizenship must have relevancy to the transaction at hand. The *Prevost* case (149 F. 2d 747 (C. A. 9)) only passed on the contention on motion to dismiss an indictment that it failed to show how and in what manner the representations of false citizenship mentioned therein were material. They held that the Court did not err in denying the Motion to Dismiss. Actually the indictment charged that the false representation of citizenship was made in connection with his selective service questionnaire and in an application for employment. The same Court in the *DePratu* case (171 F. 2d 75 (C. A. 9)) said of appellant's contention that the proof did not "sufficiently show that his claims of United States citizenship were material to the transactions at hand" that:

> "In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official duty and authority. . . . Obviously, appellant's claim of U. S. Citizenship in response to such inquiry could not be said to have been made . . . to 'stop the prying of some busy body.'"

In all of the cases that we have cited, as well as those of the Government, involved the established elements of the right legally to inquire as to citizenship, deception as to material subject matter, and the perpetration of fraud. True, the Circuit Court in the instant case, referring to their opinion in the *DePratu* case said "that the question of citizenship there was material to the transactions at hand and also that the law gave the authority and imposed the affirmative duty on the officers inquiring to ascertain the citizenship status of the defendant in that action," but they were dealing with the facts in that case and that they did not say that less would not suffice [R. 294]. They do

not find that it must not be relevant but, "We hold that where some right to inquire exists or the person inquiring has a good and sufficient reason for learning the citizenship of the person asked, it is sufficient. . . ." [R. 294.] The Court of Appeals, however, further held, and which we say erroneously, that citizenship was "material in an overall system of the Sheriff's office." [R. 290.] There was no evidence, as we have pointed out, of any purpose or reason for asking the question by the Sheriff's office. One might as well conclude that a United States citrus pest inspector in an agricultural area who is making inspections to determine proper practices and procedures for the elimination or control of pests was a person who had such a right to inquire or had sufficient reason for so doing, even though it was collateral to the treatment and control of pests.

The Government cites one case that we failed to cite: *United States v. Romberg,* 150 F. 2d 116 (C. A. 2), and claims that there was no evidence in that case of a fraudulent purpose, and quote "the sole question . . . is whether the Union's executive Board had 'some . . . adequate reason for ascertaining . . . defendant's citizenship' at a 'time of deepening national crisis.'" The second Circuit in this case makes no reference at all to whether the evidence showed or did not show the existence of a fraudulent purpose. The evidence does show, though, that he did conceal his alienage from the Union through whose Joint Employment Committee he received employment with a company which was doing work for the United States Maritime Commission. This would indicate existence of a hiring hall arrangement and that employment came through the Union rather than the employer. The Union, therefore, was directly interested in

the surveillance of its members, whom they had placed on the job, in meeting union standards of competency in doing their work and in the fulfillment of their established policies as to who might be employed on defense work. The defendant was doing electrical work at the dry docks and the business agent of the Union had made a charge to the executive board against the defendant that he had done defective work at the dry docks. The executive board during the consideration of whether it should direct an investigation of the charge, at the request of the business agent asked the defendant whether he was a citizen of the United States, to which the defendant replied, "I am."

III.

As to Government's Cross-Petition for a Writ of Certiorari.

The Government seeks a review of the reversal of Petitioner Smiley's conviction on Count 1 of Indictment No. 20069 and on the count contained in Indictment No. 20604, if this Court grants the Petition of Mr. Smiley's with reference to the affirmed Count which is the basis of his Petition in case No. 124. The Government asserts at page 7 of its Petition for Certiorari (No. 213): "If the Court should determine that the petition in No. 124 should be denied, this conditional cross-petition, involving the two counts reversed by the court below, need not be considered. It is filed solely to protect the Government's interests in the event that certiorari should be granted in No. 124." To say the least, this is a most astounding declaration. It has been our conception that the invocation of the writ of certiorari was to obtain a determination by this Honorable Court on organic and vital prin-

ciples of law as a direction and guide to the subordinate branches of the Federal judiciary. Qualified petitions are an afront to the basic principles governing the issuance of writs of certiorari.

If the correctness of the decision of the Court of Appeals that (a) an alien's answer "American" to the question of his "nationality" on a booking form filled out in connection with his being held as a material witness, and (b) his answer "yes" to the question whether he was a "citizen" on a booking form filled out in connection with his being booked on a gambling charge, do not constitute false representations of United States citizenship within the meaning of Section 746(a) (18) Title 8, U. S. C., should be determined by this Court in the opinion of the Government, then there is no moral foundation for a qualified conditional Petition suggestive of a bargain with respect to the initial Petition of the Petitioner.

Aside from the question of denial of due process and the denial of Petitioner's rights under article V of the Constitution, the basic and fundamental questions posed, as set forth in Point II, pages 14-24, of our Brief, apply fully and with equal force to the reversed counts; and a decision by this Court on this phase of the case as to the affirmed count would determine all of those questions as to the reversed counts. A determination of correctness of the Court of Appeals decision on the sufficiency of the evidence as to the reversed counts in no wise affects or has any interrelationship with the problems posed on the affirmed count with respect to which the Petitioner seeks a review.

The speciousness of the Government's Petition for Certiorari is also apparent from the statement that their Petition "is filed solely to protect the Government's inter-

est in the event the certiorari should be granted in No. 124," in view of the fact that the only thing to be protected inherent in the Judgment is a thousand dollar fine on each count.

The correctness of the Court of Appeals decision in reversing these two counts may readily be justified—at least for the purposes of this response—with these brief observations: The answer "American" to the word "nationality" in view of the evidence that the petitioner was a Canadian [R. 152, 156], is a true answer; and there was not an affirmative representation of United States citizenship. As to the limited answer "citizen," it does not constitute an affirmative false representation that he was a United States citizen. Birth alone in this country is not an affirmative claim to United States citizenship. Many have been born in the United States and have been repatriated. We believe there is the further exception of children born in the United States to diplomatic representatives of foreign countries. In fact, at one time a nativeborn Indian was not a citizen of the United States. The trial court clearly defined correctly in its instructions to the jury what constitutes a false representation under the Section in question when it instructed, "You are instructed 'to represent oneself' as a citizen, as set forth in the indictment, means to hold oneself forth as, and affirmatively claim to be, a citizen of the United States." [R. 274-5.]

Respectfully submitted,

OTTO CHRISTENSEN,
Attorney for Petitioner.

JERRY GIESLER and
ROBERT A. NEEB,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1950

No. 124

ALLEN SMILEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR A REHEARING AND STATEMENT IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

October Term, 1950

No. 124

ALLEN SMILEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A REHEARING AND STATEMENT IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States:

Allen Smiley respectfully prays this Honorable Court to reconsider its denial of his Petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, and in support thereof respectfully shows:

1. There was a denial of due process as well as a denial of Petitioner's rights under Article V of the Amendments to the Constitution.

2. The United States Court of Appeals has decided questions of substance relating to the construction of a statute of the United States contrary to the decisions of other Courts of Appeal, and which have not been, but should be, settled by this Court.

Statement in Support of Petition for Rehearing.

Petitioner was sentenced to *fine and imprisonment* in violation of subparagraph (18) of Section 746(a), Title 8, United States Code.

Point (1) is discussed at pages 1-14 of our Reply Brief, pages 6-7 of the Government's Brief in Opposition, and in our Opening Brief at pages 13-14.

We have fully set forth the record on this point in our Reply Brief at pages 1-14 because the Government's Answer was premised upon a wholly untrue set of facts. The Government's contention was—and incorrectly so—that Siu (the person to whom it is alleged a false claim of United States citizenship was made) had custody of the Petitioner while the "lower part of Exhibit 5 was being prepared, and that he (Siu) did not sign the Exhibit until it was fully completed." [R. 84-90.] It was the lower part of this Exhibit that contained the question, "U. S. Citizen?" This, we say, is not a fact. We believe the record substantiates this statement, but if there is any doubt about it, the matter is cleared up fully by the Affidavit of said Government witness, Siu, which is hereto attached as an Appendix. (The original Affidavit is on file with the Clerk of this Court.)

The fact is that the Petitioner at no time answered any question with reference to United States citizenship put to him by Siu, nor was Siu present at any time such a question was asked; further, as Siu affirms, the Petitioner at no time told him that he was a United States citizen, nor did he ever hear him so state to any other person at any time or place.

Unequivocably, the record now is that the Petitioner stands convicted of a distinct and separate offense not

charged. It is not a matter of simple variance. He stands convicted of having said to another person (Hopkins), at another time and place, that he was a United States citizen, whereas the Indictment charged that he made the false representation of United States citizenship to Siu; and the proof is that it was at another time and place than the incident with Hopkins that Siu interviewed him, at which interview nothing whatever was said about United States citizenship.

Point (2) is discussed in our Reply Brief at pages 15-20 and at pages 14-28 of our Opening Brief; the Government's Brief in Opposition discusses this question at pages 7-13. To what we have there said, we desire to make this additional comment. The Seventh Circuit Court of Appeals held in *United States v. Tandaric,* 152 F. 2d 3, 5, that the false representation which the statute prohibits is one that is made for a "fraudulent purpose," and is not ambiguous, and, "Men of common intelligence will have little difficulty in determining what is prohibited by it." But in *United States v. Frederick,* 50 Fed. Supp. 769, 771-772, the District Court said that the Act of 1940, unlike the previous acts, makes a simple false claim of citizenship, without a fraudulent or wrongful purpose, an offense. That decision was affirmed in *United States v. Frederick,* 5 Cir., 146 F. 2d 488, without discussing either the facts or the law involved in that case, but an affirmance implies an approval, *sub silentio,* of the opinion of the court below. See, also, *Prevost v. United States,* 9 Cir., 149 F. 2d 747, 748.

In *De Pratu v. United States,* 9 Cir., 171 F. 2d 75, 76, the Court said:

> "The attack upon the sufficiency of the indictment is based upon asserted necessity for allegation and

> proof of fraudulent purpose in the making of the false claim of citizenship. The present statute does not expressly so provide, and from a reading of it it readily appears, contrary to appellant's contention, that * * * [it] does not by implication or otherwise condition the outlawed offense upon the alleged existence of fraudulent purpose in the mind of the one making false claim of citizenship, although that fraudulent purpose was a necessary ingredient of the similar offense under the previous law which was superseded by said Section 746 (a) (18)."

A statute that is so worded, that courts are in disagreement as to its meaning, is too vague and ambiguous for a layman's understanding. A statute which forbids the doing of an act in terms so ambiguous that men of common intelligence must necessarily guess at its meaning, violates the first essential of due process of law. *Connally v. General Construction Co.*, 269 U. S. 385, 391; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 87-88. Such ambiguity cannot be cured by judicial construction which seeks to specify "details of the offense intended to be charged." *Lanzetta v. New Jersey*, 306 U. S. 451, 453.

In *Screws v. United States*, 325 U. S. 91, Justices Roberts, Frankfurter and Jackson, in a joint dissenting opinion, said, page 153:

> "What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process, cannot avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite."

A final and authoritative decision on the questions presented under this Point (2) by our Petition and Reply Brief and Petition for Rehearing is desirable, not only to Petitioner, but also to Government enforcement officials.

Conclusion.

Petitioner respectfully urges that the questions sought to be presented to this Honorable Court are substantial, relating to the construction and application of a statute of the United States, and they are such that they should be settled by this Court; and in the interest of justice, the Petition should be granted, and the judgment and sentence reversed, to cure the denial of due process that has occurred in this case by the conviction of Petitioner upon a charge not made.

Respectfully submitted,

OTTO CHRISTENSEN,
Attorney for Petitioner.

JERRY GIESLER and
ROBERT A. NEEB,
Of Counsel.

Certificate of Counsel.

Otto Christensen, attorney for petitioner, hereby certifies that the petition for rehearing herein filed is presented in good faith and not for delay; and that said petition is restricted to grounds which are confined to intervening circumstances of substantial and controlling effect, and other substantial grounds available to petitioner, although not previously presented.

OTTO CHRISTENSEN.

APPENDIX.

Otto Christensen, 1212 Spring Arcade Building, 541 South Spring Street, Los Angeles 13, California; Michigan 2801; Attorney for Petitioner.

In the Supreme Court of the United States.

Allen Smiley, Petitioner, vs. United States of America, Respondent. No. 124.

AFFIDAVIT OF JACOB E. SIU.

State of California, County of Los Angeles—ss.

Jacob E. Siu, being first duly sworn, deposes and says: that he is the Jacob E. Siu who testified as a witness on behalf of the United States of America in the case of United States v. Smiley (No. 20069);

That at no time did I ask the question appearing in Exhibit 5, "United States citizen?" of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or about the 25th day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley. Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did I hear him say so to any other person.

JACOB E. SIU.

Subscribed and sworn to before me this 19 day of October, 1950.

MINNIE F. CHETWOOD,
Notary Public in and for the County of Los Angeles, State of California.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 213

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEN SMILEY

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On June 9, 1950, respondent Smiley filed a petition for a writ of certiorari (No. 124) seeking review of the judgment of the Court of Appeals for the Ninth Circuit in so far as it affirmed his conviction on one of three counts charging that he falsely represented himself to be a United States citizen, in violation of Section 346(a) (18) of the Nationality Act of 1940. A brief in opposition to Smiley's petition has been filed by the Government.

The Solicitor General, on behalf of the United States, prays that in the event, but only in the event,

the petition for a writ of certiorari in No. 124 is granted, the Court also issue a writ of certiorari to review the judgment below in so far as it reversed Smiley's conviction on the remaining two counts. The certified transcript of record filed in No. 124 includes those portions of the record upon which this cross-petition is based.

OPINION BELOW

The opinion of the Court of Appeals (R. 288-295) is reported at 181 F. 2d 505.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1950 (R. 296). Smiley's petition for rehearing was denied on May 11, 1950, and the Government's petition for rehearing was denied on May 22, 1950 (R. 297). On June 20, 1950, the time within which to file this cross-petition for a writ of certiorari was extended by Mr. Justice Black to and including July 21, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether (a) an alien's answer "American" to a question as to his "Nationality" on a booking form filled out after his arrest as a material witness to a murder and (b) his affirmative answer to the question whether he was a "citizen" on a form signed while he was being booked on a gambling

charge, both of which answers were accompanied by statements to the effect that he was born in this country and had lived here all his life, constituted false representations that he was a United States citizen within the meaning of Section 346(a)(18) of the Nationality Act of 1940.

STATUTE INVOLVED

Section 346 of the Nationality Act of 1940 (54 Stat. 1137, 1163, 8 U. S. C. 746) provided in pertinent part at the time of the offenses involved here:

> Sec. 346. (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> * * * * *
>
> (18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.[1]
>
> * * * * *
>
> (d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> * * * * *

[1] This provision is now embodied in Section 911 of the 1948 revision of Title 18, U.S.C.: "Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both."

STATEMENT

Counts 1 and 3 of a four-count indictment (No. 20069) and another indictment in one count (No. 20604) filed in the United States District Court for the Southern District of California charged Smiley, an alien born in Russia (R. 208-209), with knowingly, wilfully, falsely, and fraudulently representing himself to be a United States citizen to Thomas A. Cox, an employee of the Beverly Hills Police Department on June 21, 1947, to J. E. Siu, a Los Angeles County Deputy Sheriff on May 25, 1944, and to the Los Angeles City Police Department on November 1, 1945, each allegedly having a good reason to inquire as to petitioner's nationality (R. 2-3, 11).[2] Smiley was convicted on each of these charges after a jury trial (R. 247-248), and he was sentenced to one year's imprisonment and fined $1,000 on each count, the imprisonment terms to run concurrently (R. 38-41). The Court of Appeals for the Ninth Circuit sustained the judgment as to count 3 of indictment No. 20069, as to which Smiley seeks review in No. 124, but reversed the judgment as to the other two counts, holding that the evidence was not sufficient to prove that Smiley had affirmatively represented himself to be a United States citizen (R. 296, 289-290).

---

[2] Count 2 of indictment No. 20069 charged the same offense as indictment No. 20604 and was dismissed on the Government's motion at the end of the trial (R. 213, 267). Count 4 of the former indictment was a perjury charge and was dismissed on Smiley's motion prior to trial (R. 2, 6, 10).

The evidence in respect of the latter counts may be summarized as follows:

Count 1 of Indictment No. 20069. On June 21, 1947, while Smiley was being booked as a material witness to a murder, Thomas A. Cox, a desk clerk of the Beverly Hills Police Department (R. 114), prepared an arrest report incorporating Smiley's answers to the questions on the report form (R. 116-118, 158). The pertinent questions (in italics) and Smiley's answers as recorded (in quotation marks) were as follows (R. 118): *Descent.* "Jewish." *Nationality.* "American." *Where Born.* "New York, New York." *Date Born.* "1/10/08." *Time in County.* "20 Yrs." *State.* "20 Yrs." *U. S. A.* "Life."

Indictment No. 20604. On November 1, 1945, Smiley was booked by Orville E. Harper, a Los Angeles City policeman (R. 99), on a gambling charge (R. 101). In the course of the booking process, Harper asked Smiley a series of questions from, and typed Smiley's answers on, Los Angeles City Police Department Form 5.5, denominated "Identification Report," which Smiley then signed (R. 96-97, 101-102, 111-112). The pertinent questions (in italics) and answers (in quotation marks) were as follows: *Citizen* "Yes." *Time in County* "20 Yrs." *State* "20 Yrs." *U. S. A.* "38 Yrs." *Age* "38." (R. 101, 107-108; Exhibit 9, R. 113.) In connection with the preparation of another form incident to the arrest, Harper asked Smiley where

he was born, to which Smiley replied, "New York" (R. 106).

In addition, there was testimony that the Los Angeles City Police Department collected statistical information from persons taken into custody for purely police purposes (R. 145); that Form 5.5, an adjunct of that department's fingerprint card, is prepared for the future identification of a person arrested (R. 97); that the department makes information on arrests available to other law-enforcement agencies, including the Immigration and Naturalization Service (R. 97-98); that the Federal Bureau of Investigation is automatically supplied with fingerprint cards and information as to charges against persons taken into custody by the department (R. 145); and that it is, and was at the time of the arrest involved in this count, the practice of the department to inform the Immigration Service of the arrest of a known alien (R. 144, 146).

Evidence pertinent to both charges. Richard B. Hood, special agent in charge of the Los Angeles office of the Federal Bureau of Investigation, testified that information obtained from fingerprint cards furnished the Bureau by law enforcement agencies may be employed in the preparation of identification orders; that such information may be made available to other law enforcement agencies, or may be used by the Bureau itself in the apprehension of fugitives; that information as to

a fugitive's nationality may be of tremendous value to an investigating officer; that information in the files of the Bureau is made available to the Immigration and Naturalization Service; and that the Bureau notifies the Service when an alien is sentenced for a crime (R. 137-140).

REASONS FOR GRANTING THE WRIT

1. The three counts on which respondent was convicted in the district court involve the same offense, i. e., false representation of citizenship of the United States, in violation of Section 346(a) (18) of the Nationality Act of 1940. The affirmance of one of these counts by the Court of Appeals is the basis of respondent's petition for certiorari in No. 124, which contends mainly that respondent's statements do not fall within the statute. For the reasons set forth in our brief in opposition, the Government is of the view that the petition in No. 124 raises no questions warranting review by this Court. If the Court should determine that the petition in No. 124 should be denied, this conditional cross-petition, involving the two counts reversed by the court below, need not be considered. It is filed solely to protect the Government's interests in the event that certiorari should be granted in No. 124. In that event it would be appropriate, in view of the interrelationship of the subject matter and questions presented by both petitions, for the Court to have the entire case before it.

2. The Court of Appeals' reversal of Smiley's conviction on count 1 of indictment No. 20069 and on the count contained in indictment No. 20604 was based solely on the ground that the statements upon which these counts were predicated did not constitute false representations of citizenship within the meaning of Section 346(a)(18) of the Nationality Act of 1940. As to the former count, the court stated that the only evidence to support Smiley's conviction consisted of his statements that he was born in this country and that he had lived here all his life, and that "A person may be born in the United States and remain therein for life and yet not be a citizen and while it may be that an officer, upon being informed by one whom he has under arrest that he, the party in custody, was born in the United States and had lived therein all his life, would conclude that the person whom he was interrogating was a citizen of the United States, it would be no more than a conclusion reached without the necessary supporting facts" (R. 290). As to the latter count, the court went further, holding in effect that nothing less than a specific, explicit statement that one is a citizen of this country falls within the purview of Section 346(a)(18). The court stated that Smiley's affirmative answer to the question whether he was a "citizen" on Form 5.5, even when taken together with his accompanying statement that he was born in New York, was not sufficient evidence to show

that he had falsely represented himself to be a *"citizen of the United States"* (R. 290-291).

The Government respectfully submits that the court below has placed an unwarranted restriction both on the scope of the statute and on the type of evidence required to support a conviction under it. On its face, Section 346(a)(18) precludes the construction that only express representations of citizenship are prohibited. The statute provides that no alien shall "falsely represent himself to be a citizen of the United States." It does not provide that the representation must follow the precise wording of the statute *in haec verba.* The term "represent" is generic, connoting every word, act, or failure to act sufficient to produce a conviction or belief on the part of another of the existence of a fact. It is defined in *Webster's New International Dictionary* (2d ed., unabridged, 1948) as meaning, first, "To bring clearly before the mind; to cause to be known, felt, or apprehended; to present; * * *." Section 79 of the Criminal Code (35 Stat. 1088, 1103),[3] the precursor of Section 346(a)(18), was interpreted in a manner consistent with this definition in *Fotie* v. *United States,* 137 F. 2d 831 (C. A. 8). In that case the court said that representations of birth in West

[3] "* * * whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both."

Virginia in an application for registration as a voter "were, if false and made for a fraudulent purpose, sufficient to constitute a violation of the statute under which the indictment was brought" (137 F. 2d at 837). These representations were made beyond the period of limitations, but the court said also that the act of voting, which occurred within that period, could, in some circumstances, constitute a false representation of citizenship.[4] An earlier holding in the same case that the mere act of voting by an alien is not in any circumstances a misrepresentation of citizenship within the meaning of the statute was withdrawn as dictum and erroneous (*ibid.*), the holding being that in any event the evidence was insufficient to show that the defendant was an alien.

The District Court accordingly instructed the jury in this case "that to 'represent oneself' as a citizen, as set forth in the indictment, means to hold oneself forth as, and to affirmatively claim to be, a citizen of the United States" (R. 274-275) and that "you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women" (R. 278). We think that the jury were justified in concluding that Smiley falsely represented himself to be a United States citizen to Cox, as alleged in

[4] See also *United States* v. *Martinez*, 73 F. Supp. 403, 406 (M.D. Pa.).

count 1 of indictment No. 20069. Contrary to the assertion in the opinion below (R. 290), the conviction on this count was not supported merely by the evidence of Smiley's statements that he was born in the United States and had lived here all his life. In addition, he answered "American" to the question "Nationality" (see p. 5, *supra*). While the word "nationality" is sometimes used to denote ancestry, it is more often associated with allegiance and citizenship. See Sections 101 and 201 of the Nationality Act of 1940, as amended (54 Stat. 1137, 1138, 60 Stat. 721, 8 U. S. C. 501, 601); *United States* v. *Wong Kim Ark,* 169 U. S. 649, 655, 656-657, 693; *Weedin* v. *Chin Bow,* 274 U. S. 657, 660; *Brassert* v. *Biddle,* 148 F. 2d 134, 136 (C. A. 2). That respondent did not understand the word "nationality" as applying to ancestry is clear from his anwer "Jewish" to the question as to "Descent." In the circumstances of this case, the jury plainly had a right to conclude that respondent's representation that his "nationality" was "American" was equivalent to a claim of citizenship of the United States.

Similarly, the court below erred in its reversal as to indictment No. 20604. The question "Citizen" on Form 5.5 could only have been meant to refer to United States citizenship. It is unreasonable to assume that a person under arrest who is asked whether he is a citizen could possibly understand such a question as referring generally to

citizenship in some country, especially when he is also questioned concerning the place of his birth and the length of his residence in the United States. That there could have been no misunderstanding on this score is evidenced by defense counsel's virtual concession at the trial that the word "citizen" referred to United States citizenship (R. 163, 251).

In respect of both counts, it does violence to the common understanding of the words used to conclude that Smiley did not represent to the respective agencies that he was a citizen of the United States.

CONCLUSION

For the reasons stated, and on the condition suggested above (pp. 1-2), it is respectfully submitted that this cross-petition for a writ of certiorari should be granted.

ARNOLD RAUM,
Acting Solicitor General.

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